

FILED
FEB 25 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON

81257-8

NO. _____
WASHINGTON STATE SUPREME COURT
COURT OF APPEALS NO. 25161-6-III

DON L. FITZPATRICK and PAM FITZPATRICK, husband and wife;
BRAD STURGILL and HEATHER FITZPATRICK STURGILL,
husband and wife,

Respondents,

v.

OKANOGAN COUNTY,

Petitioner,

and

THE STATE OF WASHINGTON, JOHN L. HAYES and JANE DOE
HAYES, husband and wife, and METHOW INSTITUTE
FOUNDATION,

Defendants.

PETITION FOR REVIEW

Mark R. Johnsen, WSBA #11080
Of Karr Tuttle Campbell
Attorneys for Petitioner
Okanogan County

1201 Third Ave., Suite 2900
Seattle, WA 98101
(206) 223-1313

TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF PETITIONER.....	1
II. COURT OF APPEALS DECISION FOR WHICH REVIEW IS SOUGHT	1
III. ISSUES PRESENTED FOR REVIEW	1
IV. STATEMENT OF THE CASE.....	1
A. Factual Background.....	1
B. Procedural Background.	3
V. LEGAL ARGUMENT	4
A. Introduction.	4
B. Fitzpatrick’s Claims are Barred by the Common Enemy Rule.	5
1. The Common Enemy Rule Precludes Liability for Dikes Which Keep Floodwaters Within the Banks of a River.....	5
2. The Exception to the Common Enemy Rule Upon Which the Court of Appeals Relied is Inapplicable.	8
3. The Dike Did Not Dam an Existing Stream nor Cause It to Back Up Onto Fitzpatrick’s Property.....	10
4. The “Obstruction” Argument Accepted by the Court of Appeals Would Eviscerate the Common Enemy Doctrine.	12
C. There Is No Basis for an Inverse Condemnation Claim Against the County.	14
VI. CONCLUSION.....	19

APPENDIX

TABLE OF AUTHORITIES

	<u>Page</u>
 CASES	
<u>Cass v. Dicks</u> , 14 Wash. 75, 44 Pac. 113 (1896)	6, 11
<u>Colwell v. Etzell</u> , 119 Wn. App. 432, 81 P.3d 895 (2003)	11
<u>Currens v. Sleek</u> , 138 Wn.2d 858, 983 P.2d 626 (1999)	9, 10
<u>Dahlgren v. Chicago M&P.S.R. Co.</u> 85 Wash. 395, 148 Pac. 567 (1915)	10
<u>Dickgieser v. State</u> , 153 Wn.2d 530, 105 P.3d 26 (2005)	16, 17
<u>Fralich v. Clark County</u> , 22 Wn. App. 156, 589 P.2d 273 (1978), <u>rev. denied</u> , 92 Wn.2d 1005	14
<u>Halvorson v. Skagit County</u> , 139 Wn.2d 1, 983 P.2d 643 (1999).....	6, 7, 9, 11, 12
<u>Harvey v. Northern Pac. Rwy. Co.</u> , 63 Wash. 669, 116 Pac. 464 (1911)	6, 11
<u>Island County v. Mackie</u> , 36 Wn. App. 385, 675 P.2d 607 (1984).....	10
<u>Lambier v. City of Kennewick</u> , 56 Wn. App. 275, 783 P.2d 596 (1989), <u>rev. den.</u> , 114 Wn.2d 1016	16
<u>Morton v. Hines</u> , 112 Wash. 612, 192 Pac. 1016 (1920).....	6, 11
<u>Olson v. King County</u> , 71 Wn.2d 279, 482 P.2d 562 (1967) ..	14, 17, 18
<u>Seal v. Naches-Selah Irrigation Dist.</u> , 51 Wn. App. 1, 751 P.2d 873 (1988), <u>rev. den.</u> , 110 Wn.2d 1041.....	15, 19
<u>Songstad v. Municipality of Metropolitan Seattle</u> , 2 Wn. App. 680, 472 P.2d 574 (1970).....	15
<u>Sund v. Keating</u> , 43 Wn.2d 36, 259 P.2d 1113 (1953)	8, 9, 11, 13
<u>Wilber v. Western Properties</u> , 14 Wn. App. 169, 540 P.2d 470 (1975)	8, 10, 11
<u>Wilson v. Keytronic Corp.</u> , 40 Wn. App. 802, 701 P.2d 518 (1985).....	14
 STATUTES	
RCW 86.12.037	3, 4
RCW 86.16.071	3, 4

OTHER AUTHORITIES

3 Farnham, Waters and Water Rights, 2561, § 880 11

RULES

RAP 13.41
RAP 13.4(b)(1)4
RAP 13.4(b)(2)4

I. IDENTITY OF PETITIONER

Petitioner is Okanogan County, a defendant in the trial court and a respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION FOR WHICH REVIEW IS SOUGHT

Petitioner Okanogan County seeks review, pursuant to RAP 13.4, of the decision of the Washington Court of Appeals, Division III dated January 22, 2008, reversing the trial court's Order of Summary Judgment (see Appendix).

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Court of Appeals' decision contradicts settled Washington caselaw regarding the Common Enemy Rule and the elements of an inverse condemnation claim.

B. Whether a governmental entity which participates in construction of a dike which effectively prevents floodwaters from overflowing the banks of a river is protected from liability to a downstream landowner by the Common Enemy Rule.

C. Whether an inverse condemnation claim is properly dismissed where the damage was not contemplated by nor necessarily incident to the governmental project.

IV. STATEMENT OF THE CASE

A. Factual Background.

Plaintiffs/Respondents Fitzpatrick and Sturgill (hereinafter "Fitzpatrick") are current and former owners of a residential lot on the

Methow River near Mazama in Okanogan County. The land was purchased by Fitzpatrick in the early 1980s. (CP 89). A home was built on the property in the mid-1980s.

On June 16, 2002, Fitzpatrick's home was swept away in a flood event on the Methow River. He contends that the property damage was caused by the presence of a dike on the river, in combination with a log jam which had formed several years earlier upstream from his property. (CP 5). The dike in question is known as the Sloan-Witchert Slough Dike (the "dike"). It is located on the other side of the Methow River from the Fitzpatrick property. At the time of its construction, the dike was approximately 1/2 mile upstream from the property subsequently purchased by Fitzpatrick. (CP 152).

A dike in this location was originally installed by private landowners prior to 1970. In the mid-1970s, Okanogan County obtained approval from the State of Washington and the U.S. government to construct/improve the dike so as to provide protection against a washout of Washington State Highway 20 and other property. (CP 3, 93-94). The improvement of the dike went forward in 1975.

In the late 1990s, Okanogan County sought permission to repair the dike, and also to remove the log jam. A Hydraulic Project Approval (HPA) was sought from the Washington Department of Fish and Wildlife. WDFW granted permission, on or about June 29, 1999, to

make limited repairs to the dike. (CP 94). However, the HPA denied permission to remove the log jam in the river.

A flood event in July 1999 resulted in the partial breach of the dike, before the County could undertake the approved repairs. Instead, the Army Corps of Engineers performed emergency repairs. (CP 94; 146-147). On or about June 16, 2002, rapid melting of snowpack in the North Cascades resulted in a high water flood event in the Methow. During this storm, the Methow River current avulsed (changed course). The Fitzpatrick home was washed away in the flood.

B. Procedural Background.

In June 2005, Fitzpatrick sued Okanogan County, the State of Washington, John Hayes and the Methow Institute Foundation in Douglas County Superior Court, alleging that the defendants should be liable for construction of the dike and for failure to remove the log jam. (CP 1-6). The defendants filed a motion for summary judgment, arguing that they are protected from liability by the Common Enemy Rule; and by RCW 86.12.037 and RCW 86.16.071; and by Fitzpatrick's failure to establish the necessary elements of his claims.

On March 7, 2006, the Honorable John Hotchkiss granted the defendants' motion for summary judgment. (CP 232-234). Fitzpatrick sought review in the Washington Court of Appeals, Division III.

On appeal, Fitzpatrick effectively conceded that his tort claims against the County and the state are foreclosed by the statutory immunity

provided by RCW 86.12.037 and RCW 86.16.071, respectively. Fitzpatrick also acknowledged that there can be no liability for the County's failure to remove a log jam in the river. In addition, Fitzpatrick dropped his claims against defendants John Hayes and the Methow Institute Foundation.

Fitzpatrick sought review only with respect to the inverse condemnation claim against the County and the state. The Court of Appeals reversed the trial court with regard to the inverse condemnation claims. Specifically, the Court of Appeals held that the defendants are not protected by the common enemy rule. The Court of Appeals also held that inverse condemnation could lie even though the washout of the Fitzpatrick property in 2002 was not necessarily incident to nor contemplated by the dike construction project.

V. LEGAL ARGUMENT

A. Introduction.

The Supreme Court should accept review under RAP 13.4(b)(1) and (b)(2), because the decision of the Court of Appeals is in conflict with longstanding caselaw established by the Supreme Court and the Court of Appeals.

The Court of Appeals erred in applying the "natural watercourse obstruction" exception to the Common Enemy Rule in the context of a river dike which effectively keeps water within the river banks. The subject dike did not "dam" the river nor force it to back up onto the

plaintiff's property. The application of the "watercourse obstruction" exception in this context would effectively eviscerate the Common Enemy Rule.

The Court of Appeals further erred in concluding that a local government can be liable for a physical "taking" of property, even where the damage was neither necessarily incident to nor contemplated by the government as a part of its project. That ruling is inconsistent with settled Washington case law, including cases arising specifically in the context of flooding.

B. Fitzpatrick's Claims are Barred by the Common Enemy Rule.

1. The Common Enemy Rule Precludes Liability for Dikes Which Keep Floodwaters Within the Banks of a River.

The Court of Appeals erred in failing to apply the common enemy rule as a defense to Fitzpatrick's claims against the governmental defendants. If allowed to stand, the Court of Appeals decision would effectively nullify over a century of Washington case law protecting governmental entities that erect river dikes to avoid flood damage.

Fitzpatrick contends that the construction or improvement of the dike in the mid-1970s created a condition which resulted, nearly 30 years later, in floodwaters suddenly entering Fitzpatrick's downstream property and destroying his home. Yet as the Washington Supreme Court has consistently held, a local government which constructs or maintains a dike to keep floodwaters from leaving the banks of a river is protected from liability to nearby property owners by the "common

enemy rule.” The common enemy rule has been recognized as a valid defense to liability in flooding cases for more than 100 years. The rule provides that “surface water is an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others.” Cass v. Dicks, 14 Wash. 75, 78, 44 Pac. 113 (1896).

Many of the leading cases upholding the common enemy rule involve the construction and maintenance of dikes and levees to prevent floodwaters from escaping the banks of the river. In Cass, this Court held that owners of land along a river were not liable for damages caused by their construction of a dike to protect their properties against flooding. Similar rulings were made in Harvey v. Northern Pac. Rwy. Co., 63 Wash. 669, 676-77, 116 Pac. 464 (1911) and Morton v. Hines, 112 Wash. 612, 192 Pac. 1016 (1920).

In a recent case with facts similar to the present controversy, this Court reaffirmed the continuing viability of the common enemy doctrine in the context of a challenge to a river dike. In Halvorson v. Skagit County, 139 Wn.2d 1, 983 P.2d 643 (1999), the plaintiffs’ properties along the Skagit River were damaged in storm events. They sued Skagit County, contending that the flood damage was more severe than it would have been had there been no levees constructed along the river. The trial court found Skagit County liable for damages attributable to the levees but the Supreme Court reversed, on two independently valid grounds: First, that the County did not own and control the levees; and

second, that the County was absolutely protected from liability by the common enemy rule:

If the County had been legally responsible for the existence of the levees, then the County should have been able to raise the common enemy doctrine as a defense to this action. We find the defense controlling.

139 Wn.2d at 13-14. The Supreme Court stressed in Halvorson that dikes and levees are designed to prevent floodwaters from leaving the channel of a river during high water events. As such, they fall squarely within the protection of the common enemy rule, and thus parties responsible for the construction of dikes and levees are not liable for flood damage to nearby properties caused by the structures:

Under longstanding Washington law, waters escaping from the banks of a river at times of flood are surface waters, and are waters that an owner of land may lawfully protect against by dikes and fills on his property, even though the effect is to cause an increased flow of water on the lands of another to the damage of his lands.

139 Wn.2d at 15. In Halvorson, the Supreme Court dismissed all claims against Skagit County as a matter of law.

The same rule applies in this case. To the extent that Fitzpatrick's property damage was caused by the existence of the Sloan-Witchert Slough dike, Okanogan County is protected from liability by the common enemy doctrine. The Court of Appeals erred in abrogating settled Washington precedent.

2. The Exception to the Common Enemy Rule Upon Which the Court of Appeals Relied is Inapplicable.

The Court of Appeals acknowledged the general common enemy rule protecting landowners who erect dikes to protect property against unwanted waters leaving the banks of rivers during high water events. The Court of Appeals erred, however, in concluding that the common enemy rule should not apply, citing the exception for obstructing the flow of a natural watercourse. Significantly, the caselaw cited by Fitzpatrick, and accepted by the Court of Appeals, does not support application of the “watercourse obstruction” exception in the context of river dike construction. Indeed, the cases cited by Fitzpatrick and the Court of Appeals do not even arise in the context of dikes along rivers.

It is true that an exception to the common enemy rule applies where a dam or other obstruction blocks the flow of a natural river or watercourse. However, this exception applies where a downstream property owner dams or blocks an existing watercourse, causing it to back up onto an upstream owner’s property. Wilber v. Western Properties, 14 Wn. App. 169, 173, 540 P.2d 470 (1975). It does not apply to a dike parallel to a river which effectively keeps floodwaters in the main channel.

The principal case upon which the Court of Appeals relies is Sund v. Keating, 43 Wn.2d 36, 259 P.2d 1113 (1953). Importantly, Sund did not involve a dike or levee, but rather involved the *excavation and removal* of a portion of the stream bank, which directed water onto

the plaintiffs' property. Id. at 38-39. Indeed, the trial court in Sund determined that the defendant *should have built a dike* to prevent the discharge of river waters onto their property:

Following a trial without a jury, the court found, in substance, that the appellants had removed a portion of the north bank of Clark Creek . . . that the appellants had refused to take the precautions suggested to them by appellants, such as building a bulkhead to retain the banks of a stream, that because of the flood, waters were diverted onto respondents' land.

43 Wn.2d at 39-40.

Thus, Sund is wholly inapposite to the issues raised in this case. Indeed, the Washington Supreme Court in Halvorson distinguished Sund v. Keating, noting its very different factual background:

Sund held that floodwaters **still flowing** within a defined "flood channel" cannot be **diverted out** of the channel without incurring liability for resulting damages. . . . While Sund narrows the concept of surface waters, **it does not change the rule that landowners seeking to protect against surface waters can build levees without incurring liability for damages, even when those levees keep floodwaters within the confines of a stream.**

139 Wn. 2d at 15-16. (Emphasis added.)

The other case cited by Fitzpatrick, and adopted by the Court of Appeals, is similarly inapposite. Currens v. Sleek, 138 Wn.2d 858, 983 P.2d 626 (1999) did not involve a dike or levee or, for that matter, any obstruction on a river. Rather, Currens involved an upland property owner who denuded the slopes of a forested hillside, causing water to run with greater velocity and intensity downhill onto plaintiffs' land.

138 Wn. 2d at 860. The suggestion that Currens provides meaningful authority in this context is misplaced.

Simply stated, the “watercourse obstruction” exception has no application in the context of an effective river dike.

3. The Dike Did Not Dam an Existing Stream nor Cause It to Back Up Onto Fitzpatrick’s Property.

All cases which have found the “watercourse obstruction” exception applicable have involved blockage of a stream -- with water actually flowing in it -- by a downstream property owner, which caused a backup onto the land of an upstream owner along the blocked stream. See, e.g., Dahlgren v. Chicago M&P.S.R. Co. 85 Wash. 395, 402, 148 Pac. 567 (1915); Island County v. Mackie, 36 Wn. App. 385, 387, 391, 675 P.2d 607 (1984). The applicability of the rule to blockage of an existing stream by a downstream landowner is explicit in numerous Washington cases (with emphasis added):

A natural drainway must be kept open to carry water into streams and lakes, and a **lower proprietor** cannot obstruct surface water **when it is running** in a natural drainage channel or depression.

Currens v. Sleek, 138 Wn.2d 858, 862, 983 P.2d 626 (1999). The rule was described as follows in Wilber v. Western Properties, supra:

A **lower landowner** who would impede or obstruct the flow of water through a natural drainway must provide adequate drainage to accommodate the flow during times of ordinary high water. If the obstruction does not accommodate that amount of flow, it has been negligently and wrongfully constructed **as to the upland owner** whose land becomes flooded.

14 Wn. App. at 173. The rule was recently reaffirmed in Colwell v. Etzell, 119 Wn. App. 432, 81 P.3d 895 (2003):

. . . even though a **downhill landowner** can lawfully repel surface water from his or her land, it must be done without blocking a natural water course or drainway.

119 Wn. App. at 441.

Significantly, the Court of Appeals supported its conclusion herein with a quotation found in the Sund v. Keating case which reaffirms the rule regarding liability for damming a water course:

Thus, the courts are very nearly agreed that the flood channel must be considered as a part of the channel of the stream, and that no structures or obstructions of any kind can be placed in its bed which will have a tendency to **dam the water back upon the property of the upper riparian owner**. (Emphasis added.)

Sund, 43 Wn.2d at 43 (quoting 3 Farnham, Waters and Water Rights, 2561, § 880) (Court of Appeals Opinion herein, p. 9).

Significantly, there is no Washington case in which a dike or levee parallel to a river, which effectively prevents floodwater from escaping the river channel, was held to fall within the “watercourse obstruction” exception to the common enemy rule. To the contrary, Washington case law consistently applies the common enemy rule of non-liability to damage caused by a dike or levee along the mainstem of a river. Cass v. Dicks, *supra*; Harvey v. Northern Pacific Railway Co., *supra*; Morton v. Hines, *supra*; Halvorson v. Skagit County, *supra*.

The Washington Supreme Court stressed in Halvorson that the County was protected from liability because the purpose of the dikes was to *prevent* waters from flowing out of the main channel of the Skagit River in high water events:

The purpose of the dikes is to control escaping floodwaters and not to have any effect on nonflooding river water.

Given these facts, the overbank floodwaters guarded against by these levees qualify as surface water.

139 Wn.2d at 18.

Similarly, in this case the Sloan-Witchert Slough Dike was built to prevent waters from escaping the Methow River and flooding nearby farms and roads, as Fitzpatrick has conceded. (CP 3, 89-90). Any incidental “blocking” of old flood channels (with no water flowing in them) did not cause damage to an upstream “riparian” landowner along any such channel. As noted, Fitzpatrick did not own land on any of the “blocked” flood channels, and his property was downstream of the dike. Thus, the “watercourse obstruction” exception to the common enemy rule is simply inapplicable, and the general rule of nonliability applies.

4. The “Obstruction” Argument Accepted by the Court of Appeals Would Eviscerate the Common Enemy Doctrine.

As the trial court properly noted in his oral remarks, the protection of the common enemy doctrine should not be eviscerated in dike cases, simply because floodwaters which otherwise *would have* escaped from the banks of a river would find low ground and tend to

flow in channels or depressions. If such an exception were recognized, it would devour the general rule. Instead, the rule cited in Sund v. Keating is that when water is currently flowing in a natural watercourse, it cannot be dammed or diverted out of that watercourse to the detriment of other riparian owners. (“*So long as the waters remain within the flood channel, the waters are properly classifiable as riparian waters.*”) 42 Wn. 2d at 42-43. (Emphasis by court).

To create liability for a stream obstruction under the rubric of riparian rights, there must be water currently flowing in the stream which is blocked and backed up, to the detriment of an upstream riparian landowner. Otherwise, the common enemy rule of non-liability applies.

The fact that – in the absence of the dike – overtopping floodwaters might have flowed in channels and swales does not change the result. Of course, the ground in a floodplain (or indeed anywhere in the real world) is not perfectly smooth like a billiard table. Thus, when water escapes the banks of a river, it will naturally flow first to those areas which are depressions in the ground surface. It is only as levels rise further that floodwater spreads out across the entire floodplain. But this simple principle of physics does not warrant overthrowing the well-settled common enemy defense in river dike cases.

Because the abandoned flood channels were not regular streams with water flowing in them, and because Fitzpatrick did not own property along those channels, he was not a “riparian owner” who could

claim that his property was damaged by blockage of the channels. Any blocking of these dry channels did not back water up onto Fitzpatrick's property. Indeed, he was a *downstream* owner. The "natural watercourse obstruction" exception to the common enemy doctrine simply has no application to a river dike case such as this one.

C. There Is No Basis for an Inverse Condemnation Claim Against the County.

The Court of Appeals also erred in viewing this case as sounding in inverse condemnation, rather than tort. Even if the common enemy rule were not available, there would still be no basis for Fitzpatrick to recover in inverse condemnation against Okanogan County because the washout in 2002 was not "necessarily incident to" nor contemplated by the County's plan of construction of the dike.

Cases in which a physical taking has been found involve a governmental project where the damage was a necessary result of the project or was contemplated by the government in the plan of construction. Inverse condemnation "was designed to compensate for damages resulting from planned action rather than mere negligence." Wilson v. Keytronic Corp., 40 Wn. App. 802, 815-16, 701 P.2d 518 (1985); Fralich v. Clark County, 22 Wn. App. 156, 162, 589 P.2d 273 (1978), rev. denied, 92 Wn.2d 1005. This rule has been repeatedly reaffirmed by the Washington courts over the past 60 years. See, e.g., Olson v. King County, 71 Wn.2d 279, 284-85, 482 P.2d 562 (1967).

The rule has been applied specifically in the context of flooding cases. In Songstad v. Municipality of Metropolitan Seattle, 2 Wn. App. 680, 472 P.2d 574 (1970), the plaintiffs sought recovery for flood damage to their property. They contended that Metro's construction of fill and installation of a pipe altered an existing watercourse, causing their property to become marshy. The trial court dismissed the inverse condemnation claim and the Court of Appeals affirmed, because the damage was not contemplated in the municipality's plan of construction. Under such circumstances, a tort analysis applies:

. . . an inverse condemnation has not occurred unless the damage is contemplated by the plan of work or considered to be a necessary incident of the maintenance of the property for a public purpose.

* * *

We believe this case involves at most a tortious injury to property. The alleged damages were not contemplated in the plan of construction, nor were they necessarily incident to the construction work performed by Metro.

2 Wn. App. at 682, 684. A similar ruling was made in Seal v. Naches-Selah Irrigation Dist., 51 Wn. App. 1, 10, 751 P.2d 873 (1988), rev. den., 110 Wn.2d 1041, where the court held that permanent flood damage to the plaintiff's orchard which occurred several decades after construction of an irrigation canal did not give rise to an inverse condemnation claim against the irrigation district.

To support its opinion on this issue, the Court of Appeals in this case relied exclusively on the opinion in Lambier v. City of Kennewick,

56 Wn. App. 275, 783 P.2d 596 (1989), rev. den., 114 Wn.2d 1016, an anomalous case that has nothing to do with a taking by flooding. Instead, Lambier involved a property owner who sued the City of Kennewick because the design and construction of a city road was dangerous, and apparently resulted in numerous cars leaving the highway and winding up in Lambier's property. The court upheld the inverse condemnation claim in that strange context. Lambier appears to be the only inverse condemnation case in Washington in the past 60 years in which the court declined to apply the requirement that damage in inverse condemnation be contemplated or necessarily incident to a governmental project. Lambier provides no meaningful precedent for evaluating inverse condemnation in the context of accidental flooding of property which occurred decades after the work was performed.

Moreover, any uncertainty as to the viability of the requirement that inverse condemnation damage be necessarily incident to, or contemplated by the government project was recently laid to rest by the Washington Supreme Court in Dickgieser v. State, 153 Wn.2d 530, 105 P.3d 26 (2005). In Dickgieser, the owners of property adjoining state forest land sued the state for flooding their property. The flooding occurred shortly after the state modified the bed of a stream that ran through plaintiff's property and logged standing timber on the state land. The action against the state included a claim for inverse condemnation. In response to the state's summary judgment motion, the Supreme Court

acknowledged the requirement in takings claims that damage be “necessarily incident” to the public project:

Citing Olson v. King County, 71 Wn.2d 279, 428 P.2d 562 (1967), the Department argues that every trespass or tortious damaging of real property does not become a constitutional taking or damaging merely because the government is involved. Rather, a taking occurs only if the state’s interference with another’s property is a “necessary incident” to the public use of the state’s land. Id. at 285.

The Department is correct that governmental torts do not become takings simply because the alleged tortfeasor is the government.

153 Wn.2d at 541. This Court stressed in Dickgieser that the plaintiffs had raised an issue of material fact showing that the flooding to the plaintiff’s property was the “inevitable consequence” of the recent logging and that the drainage problems were expressly anticipated and, indeed, “expected” by the state in its plan:

Moreover, the record contains evidence that the Department did not conduct its logging in a negligent manner and that the increased volume and rapid water runoff from the logged land onto the Dickgiesers’ property was an inevitable consequence of logging. The declaration of Joan Dickgeiser states that the Department told her it would not address the drainage problems expected as a result of the logging if the Dickgiesers’ did not sign an easement and that the Dickgiesers’ property would be flooded worse than before.

Id. at 541-42.

In contrast, there is nothing in this record to suggest that the flooding of the Fitzpatrick property was contemplated by Okanogan County when the dike was built. Indeed, it would be absurd to suggest

that when the dike was constructed in the mid-1970s, the County contemplated that a logjam would form and a major change in the river's course would occur 27 years later, flooding Fitzpatrick's home 1/2 mile downstream! The fact that the dike was in place for 27 years without any damage to Fitzpatrick's property belies the assertion of a constitutional taking.¹

In considering whether damage was "contemplated by the plan of construction" and therefore potentially a taking, the courts have stressed the importance of the passage of time, and any change of conditions between the time of the governmental action and the damage. Thus, in Olson v. King County, *supra*, this Court affirmed the dismissal of the inverse condemnation claim, noting that the construction of the road by King County occurred approximately 27 years before there was any damage to the plaintiffs' property:

In the instance case, it appears that Northern Road was constructed sometime prior to 1935. The fill above the plaintiffs' properties occasioned no damage to the properties until 1962. The inundation of the properties of the plaintiffs with rock, dirt, silt and debris in 1962 was neither contemplated by the plan of the work, nor was it a necessary incident in the building or maintenance of the road.

70 Wn. 2d at 284-85.

¹ Fitzpatrick concedes that there was no damage to his property for 27 years following the construction of the dike. (CP 123; Opening Brief, page 24).

Similarly, in Seal v. Naches-Selah Irrigation Dist., supra, the Court stressed the passage of time and the change of conditions, in dismissing the inverse condemnation claim:

The damage here was obviously not contemplated by the plan of construction, as the orchard was planted several decades after the canal was built.

51 Wn. App. at 10.

In this case, there was both an extensive passage of time, and changed circumstances between the construction of the dike in 1975 and the washout of the Fitzpatrick property. The washout occurred in 2002. Moreover, Fitzpatrick represented that a proximate cause of the washout was the presence of a log jam upstream. (CP 3-5). The passage of time and the changed circumstances refute any suggestion that the washout of the Fitzpatrick home in 2002 was necessarily incident to the 1975 dike construction.

Under these circumstances, Fitzpatrick's claim sounds in tort, not inverse condemnation, even if the common enemy defense were not available. The Court of Appeals' decision is contrary to settled Washington authority regarding inverse condemnation.

VI. CONCLUSION

Okanogan County is protected by the Common Enemy Rule from liability arising from the washout of the Fitzpatrick property. Moreover, recovery is foreclosed for the further reason that the washout was neither necessarily incident to nor contemplated by the government as a part of

its project. Okanogan County respectfully asks this Court to accept review, reverse the Court of Appeals' decision and reinstate the trial court's summary judgment order.

DATED this 14 day of February, 2008.

KARR TUTTLE CAMPBELL

By: 
Mark R. Johnsen, WSBA #11080
Attorneys for Petitioner Okanogan
County

APPENDIX

Court of Appeals Published Opinion

FILED

JAN 22 2008

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**DON L. FITZPATRICK and PAM
FITZPATRICK, husband and wife;
BRAD STURGILL and HEATHER
FITZPATRICK STURGILL, husband
and wife,**

Appellants,

v.

**OKANOGAN COUNTY; THE STATE
OF WASHINGTON,**

Respondents,

**JOHN L. HAYES and JANE DOE
HAYES, husband and wife; and
METHOW INSTITUTE
FOUNDATION,**

Defendants.

No. 25161-6-III

Division Three

PUBLISHED OPINION

SCHULTHEIS, J. — The common enemy rule, which allows landowners to repel surface waters to the detriment of their neighbors, does not apply when the landowner obstructs a watercourse or natural drainway or when the landowner obstructs riparian water from entering a flood channel. *Currens v. Sleek*, 138 Wn.2d 858, 862-63, 983 P.2d

626, 993 P.2d 900 (1999); *Sund v. Keating*, 43 Wn.2d 36, 42-43, 259 P.2d 1113 (1953).

Landowners appeal summary dismissal of their inverse condemnation claim. They claim that a dike owned, constructed, maintained, and modified by government entities blocked a side channel through which high waters would have otherwise flowed. The landowners presented evidence that the dike caused high waters flowing down the river to change the course of the channel and swept their land and home down the river. We conclude that they have presented material issues of fact that preclude summary judgment. We therefore reverse and remand.

FACTS

Siblings Heather Fitzpatrick Sturgill and Don L. Fitzpatrick (the landowners) acquired property along the Methow River in Mazama, Washington, in the early 1980s. They built a log home and garage in the mid 1980s. Prior to June 16, 2002, the channel alignment of the Methow River was generally southwest and away from plaintiffs' property. Their home was 80 to 100 feet from the Methow River, which was outside of the 100-year flood line.

On June 16, during a two-year storm event, the river avulsed—the channel changed course very quickly and resulted in a new channel alignment separate from the previous channel alignment. The change in channel alignment caused a substantial force of water to be redirected straight at the landowners' property, resulting in a rapid erosion of the land and ultimately causing their house to collapse into the river. The landowners

permanently lost their home, its contents, and a significant portion of land. The garage is now located immediately along the edge of the new riverbank.

The landowners filed an action against the State of Washington and Okanogan County claiming that the government entities' construction of a dike upstream from their property caused the avulsion and the loss of their home.¹

The government entities each moved for summary dismissal of the landowners' action. The landowners responded with evidence that, sometime around 1975, the county and the state sponsored and constructed the Sloan-Witchert Slough Dike along the Methow River's downstream right bank, approximately one and one half miles upstream from the landowners' property. The dike was constructed as a public project to defend Washington State Highway 20, the Weeman Bridge, and several private properties from flooding. The dike was subsequently repaired and/or extended between 1978 and 1999.

The landowners also presented evidence through Jeffrey Bradley, Ph.D., a water resource management expert, that the avulsion was caused by the dike's blockage of natural side channels, which would have relieved the flow of water in the river and prevented the landowners' loss. The landowners asserted that the evidence presented genuine issues of material fact. The trial court granted summary dismissal.

¹ The state and county are referred to, collectively, in this opinion as the government entities. Other named parties were dismissed on summary judgment. The landowners' do not appeal their dismissal.

DISCUSSION

Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Phillips v. King County*, 136 Wn.2d 946, 956, 968 P.2d 871 (1998); CR 56(c). The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

We review motions for summary judgment de novo, engaging in the same inquiry as the trial court, which is to treat all facts and reasonable inferences in the light most favorable to the landowners, as the nonmoving party. *Phillips*, 136 Wn.2d at 956. The government entities, as the moving party, have the burden to demonstrate the absence of a genuine dispute as to any material fact with all reasonable inferences resolved against them. *Folsom*, 135 Wn.2d at 663.

If there is a dispute regarding the “nature or classification” of the water at issue, it is a question of fact and therefore improper for resolution on summary judgment. *Snohomish County v. Postema*, 95 Wn. App. 817, 820, 978 P.2d 1101 (1998). Similarly, “[w]hen a question is raised as to the existence of a natural watercourse, that question must be determined by the trier of fact.” *Buxel v. King County*, 60 Wn.2d 404, 408, 374

No. 25161-6-III
Fitzpatrick v. Okanogan County

P. 250 (1962) (citing *Tierney v. Yakima County*, 136 Wash. 481, 239 P. 248 (1925)).

That is precisely the issue here.

COMMON ENEMY DOCTRINE

Washington courts have recognized this common law rule in some form for more than a century, which recognizes that “surface water, caused by the falling of rain or the melting of snow, and that escaping from running streams and rivers, is regarded as an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others.” *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896). Because its strict application has proven inequitable, our courts have developed exceptions to the common enemy rule. *Currens*, 138 Wn.2d at 861-62.

Washington’s common enemy doctrine “allows landowners to alter the flow of surface water to the detriment of their neighbors, so long as they do not block a watercourse or natural drainway.” *Id.* at 862-63. Landowners are not shielded from liability if they dam up a stream, gully, or drainway, because “[a] natural drainway must be kept open to carry water into streams and lakes.” *Id.* at 862 (citing 78 AM. JUR. 2D *Waters* § 134 (1975)).

The landowners have presented evidence that the waters held back by the dike would have otherwise flowed through natural side channels and rejoined the river. The government entities argue that the common enemy doctrine insulates upstream landowners, as a matter of law, from damage caused by diking because the

watercourse/drainway obstruction rule does not apply to diking. The government entities rely largely on *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999).

In *Halverson*, the landowners' properties along the Skagit River were flood-damaged, which they claimed was exacerbated by the presence of levees along the river.² Our Supreme Court reversed the judgment because, in part, the common enemy doctrine provided a complete defense to the county's liability and the trial court failed to properly instruct the jury on the doctrine. *Halverson*, 139 Wn.2d at 13-14.

The landowners in this case properly point out that the overbank floodwaters in *Halverson* did not flow within a defined flood channel. *Id.* at 14 n.14. The *Halverson* court implied that if there were such evidence, it would apply an aspect of the doctrine expressed in *Sund*, in which case it would reach a different result. *Id.* (citing *Sund*, 43 Wn.2d at 42-46).

We also find *Sund* to be persuasive authority. There, the court examined the character that water assumes when it overflows a riverbank in times of flooding. *Sund*, 43 Wn.2d at 41-43. The government entities correctly point out that our courts have held that such water is surface water—against which they are entitled to protect themselves under the common enemy doctrine. *Halvorson*, 139 Wn.2d at 14-15; *Sund*, 43 Wn.2d at

² The levees in *Halverson* “are located between 50 and 1,000 feet from the Skagit River’s banks. The river waters do not come into contact with the levees until the waters leave the banks of the river channel.” *Halverson*, 139 Wn.2d at 5. In this case, no assertion is made regarding the placement of the dikes in relation to the river banks.

No. 25161-6-III

Fitzpatrick v. Okanogan County

41-42 (citing *Cass*, 14 Wash. 75; *Harvey v. N. Pac. Ry. Co.*, 63 Wash. 669, 116 P. 464 (1911); *Morton v. Hines*, 112 Wash. 612, 192 P. 1016 (1920); *DeRuwe v. Morrison*, 28 Wn.2d 797, 184 P.2d 273 (1947)).

However, the *Sund* court declared: “The weight of authority inclines to the view that surface water, which has joined the course of a stream and has become subject to its current, ceases to possess the characteristics of diffused or vagrant surface waters and becomes part of the stream.” *Sund*, 43 Wn.2d at 42; accord *Halvorson*, 139 Wn.2d at 14-15; *Marshland Flood Control Dist. of Snohomish County v. Great N. Ry. Co.*, 71 Wn.2d 365, 369-70, 428 P.2d 531 (1967). Under the facts in *Sund*, the court held that the law of riparian water imposed liability to a landowner whose excavation near the bank of a stream caused the stream to change its course. *Sund*, 43 Wn.2d at 42; see also *Marshland*, 71 Wn.2d at 369-70.

In *Sund*, the stream was normally about 15 to 20 feet wide and 18 inches deep. 43 Wn.2d at 38. The riparian landowner’s excavation, which interfered with a natural barrier that had served to keep floodwaters in check, was “fifty to sixty feet north of the north margin of [the stream].” *Id.* The flood channel included the land between the stream’s bank and the natural barrier, which served as the bank of the flood channel. *Id.*

Here, the landowners’ expert stated that the side channels were a part of the floodplain and the dikes interfered with natural high flow to these side channels. Though the government entities did not counter this evidence, the state characterizes the side

channels as “merely depressions in the floodplain that carry water only in high water events.” State’s Br. at 13. To the contrary, as the landowners point out, a memorandum authored by a state hydrologist with the department of ecology reads:

This road and dike work has impacted the Methow River by cutting off at least three natural overflow channels in the floodplain, thereby compressing more flood flow into the main channel and reducing the natural flood conveyance capacity of the river. Overall this work has cut off about a mile of overflow channels. Additional velocity and quantities of high flows compressed into the main channel during floods are disrupting the natural bed form of the river and causing additional erosion and scour of the main channel downstream.

Clerk’s Papers (CP) at 254-55.

The character of the water is an issue of fact. The landowners have presented an issue of material fact as to the existence of circumstances under which the legal rule in *Sund* would apply:

[I]f the waters were in the flood channel of a stream, then certain principles become self-evident: (a) They are properly classified as riparian waters rather than surface waters; (b) being riparian waters, the rules relating to watercourses would apply. . . . As a consequence of the applicability of the law of riparian waters, appellants in the case at bar could neither intentionally nor negligently disturb the channel of the stream for their own purposes or to flood respondents’ land; nor could they interfere with the flood channel of the stream—for that, also, is properly regarded as part of the stream.

43 Wn.2d at 44-45.

The government entities insist that *Sund* does not apply because in that case the parties were adjoining landowners disputing the flood channel of a stream; but here the

landowners do not have riparian rights to waters in the stream that the government entities obstructed. We are not persuaded.

We agree that when riparian rights exist, they derive from the ownership of land contiguous to or traversed by a watercourse. *Dep't of Ecology v. Abbott*, 103 Wn.2d 686, 689, 694 P.2d 1071 (1985). However, it is important to note that the *Sund* court adopted the following language it quoted from a water rights treatise:

“Every stream flowing through a country subject to a changeable climate must have periods of high and low water. And it must have, not only its ordinary channel which carries the water in ordinary times, but it must have, also, its flood channel to accommodate the water when additional quantities find their way into the stream. *The flood channel of the stream is as much a natural part of it as is the ordinary channel.* It is provided by nature, and it is necessary to the safe discharge of the volume of water. With this flood channel no one is permitted to interfere to the injury of other riparian owners. . . . Thus, the courts are very nearly agreed that the flood channel must be considered as a part of the channel of the stream, and that no structures or obstructions of any kind can be placed in its bed which will have a tendency to dam the water back upon the property of the upper riparian owner.”

Sund, 43 Wn.2d at 43 (emphasis added) (emphasis omitted) (quoting 3 FARNHAM, WATERS AND WATER RIGHTS, 2561, § 880). The landowners' property is situated on the Methow River, which affords them standing.

Sund also relied on *O'Connell v. East Tennessee, Virginia & Georgia Railway Co.*, 87 Ga. 246, 13 S.E. 489, 490 (1891), which held that because floodwaters were not surface waters, a flood channel cannot be obstructed without incurring liability. The Georgia court distinguished between surface water and floodwater:

“If the flood water becomes severed from the main current, or leaves the stream never to return, and spreads out over the lower ground, it has become surface water. But if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river.”

Sund, 43 Wn.2d at 43 (quoting *O’Connell*, 13 S.E. at 489).

The *O’Connell* court agreed with the FARMHAM, *supra*, treatise and other authorities in holding that the volume of water due to seasonal flow does not define a river or its flood channels, where these points in the river “act as natural safety-valves in times of freshet.” *O’Connell*, 13 S.E. at 489.

The landowners presented evidence that the side channel drainways identified by its expert constituted flood channels under *Sund*. Such water cannot be blocked as surface water because it is part of the waterway. And waterways cannot be blocked. *Conger v. Pierce County*, 116 Wash. 27, 198 P. 377 (1921).

The county concedes that ““even though a downhill landowner can lawfully repel surface water from his or her land, it must be done without blocking a natural water course or drainway.”” County’s Br. at 14 (emphasis omitted) (quoting *Colwell v. Etzell*, 119 Wn. App. 432, 441, 81 P.3d 895 (2003)). But it claims that liability attaches only to downstream owners who damage the property of upstream landowners by backed-up water. *E.g.*, *Currens*, 138 Wn.2d at 862. It is true that the only cases presented by the

parties involve those factual circumstances.³ But the government entities provide no authority expressly stating, and no argument as to why, the rule applies *only* under those circumstances.

In fact, *Conger* held that the state and county could not be relieved from liability to downstream owners when it straightened a waterway, causing the course of the river's current to shift and erode the downstream landowners' property. 116 Wash. at 42; *see also Marshland*, 71 Wn.2d 365 (finding liability for damage to railroad bridge from increased water flow in the waterway due to diking).

IMMUNITY

The county claims it has immunity from the damages sought here. RCW 86.12.020 authorizes counties to construct and maintain dikes and levees to protect against floods. RCW 86.12.037 provides: "No action shall be brought . . . against any county . . . for any noncontractual acts or omissions . . . relating to the improvement, protection, regulation and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks and waters thereof."

³ *See, e.g., Wilber v. W. Props.*, 14 Wn. App. 169, 173-74, 540 P.2d 470 (1975) (obstruction of drainage ditch caused backed-up water and flooding); *Dahlgren v. Chicago, Milwaukee & Puget Sound Ry. Co.*, 85 Wash. 395, 406, 148 P. 567 (1915) (obstruction of watercourse caused backup flow flooding); *Miller v. E. Ry. & Lumber Co.*, 84 Wash. 31, 33, 35-36, 146 P. 171 (1915) (obstruction of stream caused backup flow flooding plaintiff's land).

RCW 86.12.037 was enacted to shield counties from liability for their efforts to protect the public from flood damage. *Short v. Pierce County*, 194 Wash. 421, 430-31, 78 P.2d 610 (1938). The statute provides immunity to counties where their negligence in the construction and maintenance of flood control devices results in damage to private property during floods or other periods of high water. *Id.* at 431.

Similarly, the state argues that it is immune. RCW 86.16.071 provides: “The exercise by the state of the authority, duties, and responsibilities as provided in this chapter [flood plain management] shall not imply or create any liability for any damages against the state.” Damages include harmful inundation, water erosion of soil, stream banks and beds, and stream channel shifting. RCW 86.16.120.

The landowners correctly note that the immunity does not extend to an unconstitutional taking. In *Paulson v. County of Pierce*, 99 Wn.2d 645, 652, 664 P.2d 1202 (1983), the court held that because RCW 86.12.037 does not affect fundamental rights, it does not prohibit recovery under the takings provision of our state constitution, article I, section 16. *Accord Halverson*, 139 Wn.2d at 12; *see also Conger*, 116 Wash. at 38-40. The county disregards that portion of the opinion and argues only the facts of *Paulson*: that the county was found to be immune from liability for damages caused by a breach of the levy. *Paulson* was clearly a tort action. 99 Wn.2d at 649, 650-51.

The same is true for *Short*, also relied upon by the county. In *Short*, the landowners alleged that because the county failed to properly repair a break in a bulkhead

with cement, choosing instead to fill the hole with stakes and brush, the wall gave way and the rushing water eroded two acres of the landowners' topsoil. *Short*, 194 Wash. at 428-29. The court held that the immunity statute applied to that claim. *Id.* at 430.

The governmental entities also rely on *Halvorson*, which they assert holds that tort immunity is inapplicable only when the alleged violation is solely based on constitutional grounds and the immunity applies here because the landowners have pleaded tort claims as well as constitutional claims.

In *Halvorson*, the court discussed a "hybrid" tort and inverse condemnation claim. 139 Wn.2d at 11-12. But that was in the context of whether the county could be held liable under the tort concept of joint and several liability. *Id.* at 11. The landowners did not introduce such a hybrid concept here.

The governmental entities incorrectly assert that because the landowners claim that the entities negligently constructed the dike in the wrong location, their takings action is actually a tort action, to which it is immune as in *Short*. The landowners' claim is for blocking a natural drainway or flood channel. Negligence is not an issue.

INVERSE CONDEMNATION

Article I, section 16 of the Washington Constitution prohibits the taking or damaging of private property without just compensation. The Washington Supreme Court has interpreted this provision to allow a landowner to bring an inverse condemnation action to "recover the value of property which has been appropriated in

fact, but with no formal exercise of [condemnation] power.’” *Pierce v. Ne. Lake Wash. Sewer & Water Dist.*, 123 Wn.2d 550, 556, 870 P.2d 305 (1994) (alteration in original) (quoting *Martin v. Port of Seattle*, 64 Wn.2d 309, 310 n.1, 391 P.2d 540 (1964)).

The elements of inverse condemnation are: “(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings.” *Phillips*, 136 Wn.2d at 957. “The taking or damaging of property to the extent that it is reasonably necessary for the maintenance and operation of other property devoted to a public use is a taking or damaging for a public use and subject to the provisions of article I, section 16, of the Washington State Constitution.” *Dickgieser v. State*, 153 Wn.2d 530, 535, 105 P.3d 26 (2005).

The parties generally agree that a takings claim can lie for damages that are “necessarily incident to” or a “necessary consequence of” a public project. State’s Br. at 16-17; County’s Br. at 25-26; Appellants’ Br. at 8-11. But the government entities assert that their actions do not constitute a taking because the damage to the landowners’ property was not contemplated by them and it was not “necessarily incident to” the construction of the dike. State’s Br. at 16-17; County’s Br. at 22-28. A similar argument was made and rejected by this court in *Lambier v. City of Kennewick*, 56 Wn. App. 275, 279-80, 783 P.2d 596 (1989). *Lambier* held: “The unintended results of a governmental act may constitute a ‘taking.’” 56 Wn. App. at 281. But the landowners must show

proximate cause between the governmental activity and the landowners' loss. *Halverson*, 139 Wn.2d at 12-13 (“To have a taking, some governmental activity must have been the direct or proximate cause of the landowner’s loss.”) (quoting *Phillips*, 136 Wn.2d at 966) (citing *Lambier*, 56 Wn. App. at 283 n.4).

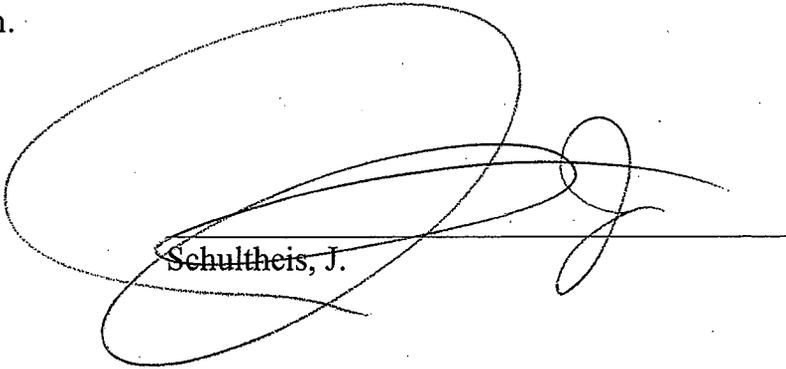
Liability may exist when the alleged taking or damage was caused by affirmative action of a government entity, i.e., appropriating the land, restricting its use through regulation, or causing damage by constructing a public project to achieve a public purpose. *Rains v. Dep’t of Fisheries*, 89 Wn.2d 740, 745-47, 575 P.2d 1057 (1978). Here, the landowners assert that the government entities’ affirmative action was their construction, maintenance, and modification of the dike. The state claims that it did not own, plan, construct, operate, maintain, or design the dike. The landowners presented evidence that: (1) the county received right-of-way deeds for the dike, which was used in part as a public recreation trail, in early 1990; (2) the land upon which the dike was built was deeded to the county and state sometime in the 1990s; and (3) the state and county made written agreements for the 1975 construction of the dike as well as for the improvements and modification in 1978, which would be performed by the county subject to the approval of the director of ecology; (4) the county and state were both involved in the construction and improvement of the dike, which was intended to “protect nearby properties, including Highway 20, from flood damage in high water events” (CP at 92-93); and (5) the state and county, as co-owners, applied to repair the dike.

The landowners properly state that they have presented genuine issues of material fact regarding the state and county's roles in the construction, improvement, and maintenance of the dike in which they had ownership interest, rendering summary judgment inappropriate on this basis.

The county asserts that a proximate cause of the flooding was the presence and release of an upstream logjam. This is a question for the jury. It also claims that the logjam was an "intervening natural event" that negates the claim that the avulsion of the stream and damage to the property was necessarily incident to the dike. County's Br. at 28. Because the county does not support its intervening natural event theory with authority, we will not address it. *See* RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

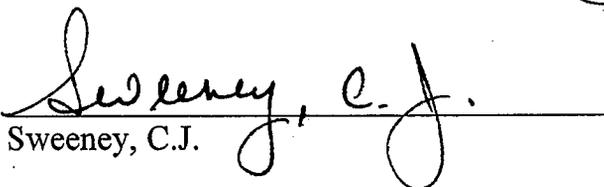
The landowners have presented issues of fact that preclude summary judgment on their inverse condemnation claim.

Reversed and remanded.



Schultheis, J.

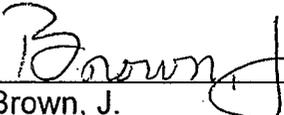
I CONCUR:



Sweeney, C.J.

No. 25161-6-III

BROWN, J. (dissenting) — I would affirm the summary judgment grant for Okanogan County and Washington state on two grounds. First, the common enemy rule applies as a defense to this flooding claim. *Halvorson v. Skagit County*, 139 Wn.2d 1, 13-15, 983 P.2d 643 (1999). Moreover, the state lacks the necessary proprietary interest in the Sloan-Witchert Slough Dike to attach liability under *Halvorson*. Even considering their inverse condemnation theory, Heather Fitzpatrick Sturgill and Don L. Fitzpatrick's proposed watercourse exception to the general rule of non-liability, would effectively eliminate the common enemy rule as developed in Washington for over 100 years. Second, even if the common enemy rule did not apply, I would hold that statutory immunity applies to the county under RCW 86.12.037 and to the state under RCW 86.16.071. Accordingly, I respectfully dissent.


Brown, J.